speaking of ethics

By Saul Jay Singer

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Rule 1.7(b)(4) Conflicts: When It's *Personal*!

As Associate General Counsel (Litigation) for Federal Agency in the District of Columbia, Alice Cooper and Marilyn Manson are responsible for defending their agency against employment discrimination cases brought by Agency personnel. They receive an official notice advising that, because of the sequester,[1] all Agency lawyers will be subject to an 11-day administrative furlough.[2] A furious Alice is determined to appeal her furlough before the Merit Systems Protection Board, as is her right,[3] but Marilyn, though unhappy, believes that an MSPB appeal is futile and writes off her loss as yet another sacrifice to be made as part of her career in public service.

At an emergency meeting of all legal personnel a few weeks later, Agency General Counsel advises that the Agency has been hit with literally hundreds of employee claims challenging the legality and propriety of the furloughs and that, as such, *every* lawyer in the Litigation Branch is expected to roll up his or her sleeves and put in the time and effort necessary to defend the Agency against all such claims. When Alice advises General Counsel that she has her own claim pending on that very issue, she is sternly rebuked and ordered to "do your job." When Marilyn protests that, although she is not pursuing her own claim, she feels uncomfortable litigating against her colleagues—the very people with whom she interacts on a day-to-day basis and with whom she will have to continue to work after the furlough cases end—she is similarly admonished and ordered by General Counsel to do what she was hired to do. When the attorneys return to their offices, they each find 10 furlough case files waiting for them.

Meanwhile, across town at the Conflicts 'R Us[4] law firm, George Eliot has been retained to represent Plaintiff in a huge medical malpractice case against Irving Julius, M.D., one of the largest clients of an accounting firm that George owns on the side. "No problem," he tells his partners. "I never represented Dr. I, and he never received any legal advice from me; in fact, I'm almost certain that he doesn't even know that I'm an attorney."

George's partner, Patrick Benatar, has been working a large contingency case for almost two years and finally—finally!—the defendant has put a settlement offer on the table. Patrick's house is "under water," his divorce and the court's alimony and support order have financially devastated him, and he is at the end of his rope in attempting to avoid a bankruptcy filing, and if his client accepts the settlement offer, which George thinks is fairly reasonable, his earned contingency fee would offer financial salvation.

Another case comes in from Joannie Sue Cash (aka "A Lawyer Named Sue"), a former Conflicts 'R' Us partner. Sue now serves as in-house counsel for Kumquat Komputer, Inc., in which capacity she refers the more complex cases out to various D.C. law firms. Well aware of the excellence and reputation of her former firm's patent practice, she refers to Conflicts 'R' Us a particularly challenging patent infringement case against Computer Chips Ahoy, Inc.

* * *

Many lawyers inherently think of "conflicts" as those that arise between two or more current clients[5] or between a current and a former client.[6] Thus, for example, George Eliot sees no problem in filing suit against a large client of his accounting firm because he never represented that client as a lawyer.[7] However, disqualifying conflicts may not involve conflicts between two or more clients but, rather, conflicts that are personal to the lawyer.

The analysis of such conflicts begins with Rule 1.7(b)(4):

> (b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if: . . .
>
> (4) The lawyer's professional judgment on behalf of the client will be *or reasonably may be* adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

(Emphasis added). This rule has exceptionally broad applicability; a lawyer has a Rule 1.7(b)(4) conflict not only where there exists an actual personal conflict, but even in cases where it is objectively *possible* for the lawyer to "pull his punches" in representing a client. Thus, for example, as to our furlough hypothetical, the D.C. Bar Legal Ethics Committee determined in Legal Ethics Opinion (LEO) 365 that Rule 1.7(b)(4)

> generally applies to a lawyer who is asked to defend an agency's furlough of other agency employees while the lawyer is pursuing her own challenge to the same furlough. [Such a lawyer] might be motivated to pull her punches in defending against substantially similar complaints brought by other agency employees, especially if the lawyer's advocacy on behalf of the agency may detrimentally affect her own case.

This opinion establishes clearly that Alice would have a personal conflict were she to defend the Agency against furlough claims by other Agency personnel. However, I submit that Marilyn would also have a Rule 1.7(b)(4) conflict pursuant to the broad "punch-pulling" analytical approach even though she herself has decided not to pursue a furlough action against the Agency. Because of her obviously strongly felt personal concerns about litigating against her friends and coworkers, there exists a reasonable possibility that her professional judgment on behalf of the Agency may be compromised.

However, notwithstanding their personal conflicts, it may still be ethically permissible for Alice and Marilyn to represent the Agency in these furlough cases

if they can meet the two requirements of Rule 1.7(c):

> (c) A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if
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> (1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and
>
> (2) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

As comment 7 explains:

> The underlying premise is that disclosure and informed consent are required before assuming a representation if there is any reason to doubt the lawyer's ability to provide wholehearted and zealous representation of a client . . . Although the lawyer must be satisfied that the representation can be wholeheartedly and zealously undertaken, if an objective observer would have any reasonable doubt on the issue, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interest.[8]

Rule 1.7(c)(1), which is an informed consent provision,[9] is easily met in this furlough case, where the client (i.e., the Agency) not only consents to the representation but, in fact, directs it.[10] Many lawyers erroneously conclude that obtaining the client's informed consent effectively resolves the personal interest conflict. In fact, pursuant to Rule 1.7(c)(2), the lawyer must also undertake *both* a subjective self-assessment and an objective analysis to determine whether, notwithstanding the client's informed consent, she will be able to go forward devoting no less than 100 percent of her efforts to the client with full competence, diligence, and zealousness and without a thought to her own interests. In the language of LEO 365:

> [T]he lawyer must [subjectively] hold such a belief *and* that belief must be reasonable under an objective standard . . . the prohibition of Rule 1.7(b)(4) is one which is highly dependent on the circumstances of the representation and the lawyer's own circumstances . . . we can do no more than identify the conflict of interest considerations, and leave it to the inquirer to determine whether the particular circumstance of his representation of his client are such that his judgment "will be or reasonably may be affected" . . . .

Some lawyers in Alice's position could undertake the requisite self-evaluation and subjectively conclude that "I am a consummate professional who can, and will, continue my practice of always being able to set aside all personal distractions and concerns so as to devote myself fully to the client's interests." However, whether a reasonable person in Alice's position could *objectively* come to that conclusion is, at the very least, arguable. Moreover, while it would almost certainly be generally easier for lawyers who have no furlough claims against the Agency to pass the objective test, Marilyn's personal concerns about litigating against her colleagues might mean that she could not satisfy the Rule 1.7(c)(2) subjective test and that, as such, she must refuse any assignment to represent the Agency against furlough claims.

It is important to note a significant distinction between personal conflicts under Rule 1.7(b)(4) and most other conflicts.

George Eliot has a clear Rule 1.7(b)(4) conflict because there is, at the very least, the possibility that he will "pull his punches" while representing Plaintiff in fear of alienating defendant Dr. I, a very large and important client of his accounting firm. Before commencing the representation, George will be required to: (1) obtain Plaintiff's informed consent to undertake the representation, after fully disclosing the scope of his relationship with Dr. I; and (2) undertake the requisite subjective self-evaluation to ensure that he can devote all his efforts and resources to Plaintiff, notwithstanding his broad personal concern for Dr. I's interests.

The financially desperate Patrick Benatar, who has a massive self-interest in getting his client to settle, would certainly be required to disclose to the client his financial problems and his keen personal interest in accepting the settlement offer. Even if the client agrees to grant informed consent to Patrick's continued representation, I think it would be very difficult indeed for Patrick to satisfy the Rule 1.7(c)(2) subjective test, and arguably impossible to believe that an objective person in Patrick's position would not at all be influenced by his great personal need to facilitate a settlement.

Similarly, there is at least the possibility that, in referring Kumquat Komputer to Conflicts 'R' Us, Sue Cash is trying to hedge her bets and curry favor with her former law firm in the event that she decides to return to her practice there, or that she is otherwise interested in promoting and furthering her connections to firm lawyers. As such, she would have to first obtain informed consent from Kumquat's duly authorized constituent[11] before making the referral. As to Rule 1.7(c)(2), the objective test should not be a problem here because a reasonable person could conclude that a lawyer with years of experience at a firm and who has intimate knowledge of that firm's strengths and weaknesses would be in a particularly strong position to determine the qualifications of that firm to serve as outside counsel. Subjectively, Sue must determine whether or not she has the best of motives and is acting solely in her client's interest in referring Kumquat to Conflicts 'R' Us.

It is important to note a significant distinction between personal conflicts under Rule 1.7(b)(4) and most other conflicts. While the D.C. Rules, unlike the American Bar Association Model Rules, generally do not permit ethical screening,[12] a specific exception is made for lawyers with personal conflicts. This means that even if George Eliot, Patrick Benatar, and Sue Cash have unresolvable personal conflicts, they may be timely screened and other Conflicts 'R Us lawyers could represent those clients in those cases.[13]

Finally, a practice tip: Traditional systemic conflicts checks, where firms and lawyers check each new client against a database of former and existing clients, are necessary—but not sufficient—to determine if a conflict exists. In each case, lawyers involved in a prospective representation must carefully consider Rule 1.7(b)(4) and the possibility of a disqualifying *personal* conflict. Moreover, lawyers must be ever vigilant regarding the possibility that a personal conflict may later rear its ugly head during the course of a representation.

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Notes

1 Automatic budget sequestration is a provision of the Budget Control Act of 2011, Pub. L. 112–25, S. 365, 125 Stat. 240, signed into law by President Obama on August 2, 2011.

2 The U.S. Office of Personnel Management defines an administrative furlough as "a planned event by an agency which is designed to absorb reductions necessitated by downsizing, reduced funding, lack of work, or any budget situation other than a lapse in appropriations," noting that [F]urloughs that would potentially result from sequestration would generally be considered administrative furloughs."

3 *See generally* 5 C.F.R. pts. 351, *Reduction in Force*; 752, *Adverse Actions*.

4 The ethical propriety of this firm name is beyond the scope of this article. *See*, however, Rule 7.5 (Firm Names and Letterheads).

5 *See* generally Rule 1.7 (Conflict of Interest: General).

6 *See generally* Rule 1.9 (Conflict of Interest: Former Client).

7 Potential issues arising out of Rule 5.7 (Responsibilities Regarding Law-Related Services) are beyond the scope of this article.

8 *See also* Comment 11: "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."

9 Informed consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonable available alternatives to the proposed course of conduct." Rule 1.0(e).

In the context of resolving personal conflicts, it is critically important for a lawyer seeking to represent New Client to carefully consider the implications of Rule 1.6 (the duty to maintain and protect client confidences and secrets) in seeking informed consent. If, for the consent by New Client to be "informed," the lawyer would be required to disclose Rule 1.6-protected information from another client (current or past), the lawyer would be ethically prohibited from doing so. The result would be that the lawyer could not obtain the requisite *informed* consent; he could not satisfy Rule 1.7(c)(1); he, therefore, could not remove the taint of his Rule 1.7(b)(4) personal conflict; and he would be precluded from representing New Client.

10 The important question of when a lawyer must refuse to follow the orders of a supervisor is beyond the scope of this article. *See generally* Rule 5.2 (Subordinate Lawyers) and Saul Jay Singer, *Obedience,* Speaking of Ethics, Wash. Law., Jan. 2009, at 12. As to following orders from a supervisor in the specific context of being ordered to represent an agency against furlough actions by fellow employees, *see* the excellent discussion on this question in LEO 365.

11 *See* Rule 1.13(a) (Organization as Client).

12 Pursuant to Rule 1.0(l), screening "denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law."

13 *See* Rule 1.10(a)(1) (Imputed Disqualification: General Rule). There is no imputation of a lawyer's personal conflicts to other firm lawyers if "the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4) and that interest does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm."

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE STEVEN T. BERMAN. Bar No. 417783. June 27, 2013. The D.C. Court of Appeals disbarred Berman by consent.

IN RE ROBERT N. VOHRA. Bar No. 426365. June 27, 2013. The D.C. Court of Appeals suspended Vohra for three years with fitness. While representing two married clients in an immigration matter, Vohra violated rules pertaining to competence, skill, and care; zeal and diligence; intentional failure to seek clients' lawful objectives; intentional prejudice to clients; failure to act with reasonable promptness; failure to keep clients reasonably informed; failure to explain the matter to the extent reasonably necessary to allow clients to make informed decisions; knowing false statement of material fact to a tribunal; knowing false statement of fact in connection with a disciplinary matter; commission of a criminal act that reflects adversely on the lawyer's honesty, truthfulness, or fitness as a lawyer; dishonesty, fraud, deceit, or misrepresentation; and serious interference with the administration of justice. Rules 1.1(a), 1.1(b), 1.3(a), 1.3(b)(1), 1.3(b)(2), 1.3(c), 1.4(a), 1.4(b), 3.3(a)(1), 8.1(a), 8.4(b), 8.4(c), and 8.4(d).

Reciprocal Matters

IN RE MARTA M. BERTOLA. Bar No. 447898. June 13, 2013. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Bertola for 60 days with fitness. Bertola consented to discipline in Maryland for misconduct, including unauthorized practice of law while her license was decertified due to her failure to file required IOLTA and pro bono reports.

IN RE GERALD F. CHAPMAN. Bar No. 432168. June 6, 2013. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and indefinitely suspended Chapman, with the right to seek reinstatement after 90 days. Chapman's reinstatement is contingent upon a showing of fitness. The Maryland court found that Chapman violated rules relating to communication with clients, improper fees, safekeeping property, responsibilities regarding nonlawyer assistants, and dishonesty.

IN RE DALE E. DUNCAN. Bar No. 370591. June 13, 2013. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Duncan for two years, which shall be served after he completes his earlier suspension. In Virginia, Duncan was found to have failed to cooperate with a disciplinary investigation.

IN RE MICHAEL LAWRENCE EISNER. Bar No. 987138. June 13, 2013. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Eisner. Eisner consented to revocation of his license in Virginia for misconduct, including abandonment of clients and failure to safeguard client property.

IN RE SHANNON M. GUIGNON. Bar No. 977747. June 13, 2013. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Guignon. Guignon consented to revocation of his license in Virginia for misconduct, including neglect of a client's matter and subsequent dishonesty to conceal his earlier misconduct from the client.

IN RE THOMAS A. HAWBAKER. Bar No. 416661. June 6, 2013. In a reciprocal matter from California, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Hawbaker. The California court found that Hawbaker willfully misappropriated settlement funds.

IN RE KIMUEL W. LEE. Bar No. 424701. June 6, 2013. In a reciprocal matter from Louisiana, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Lee for two years, with reinstatement conditioned upon a showing of rehabilitation in accordance with the provisions of D.C. Bar R. XI, §§ 3(a)(2) and 16, *nunc pro tunc* to November 27, 2012. The Louisiana court found that Lee violated rules relating to incompetence, collecting an unreasonable fee, failure to timely turn over property to third parties, and dishonesty.

IN RE JOSEPH LOUIS LISONI. Bar No. 966515. June 6, 2013. In a reciprocal matter from California, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Lisoni for three years, with the last year of the suspension stayed subject to a four-year probationary period, and with reinstatement after serving the two-year active suspension period subject to a fitness requirement, the payment of restitution, and other conditions imposed in California. In California, Lisoni stipulated to violations of rules relating to a conflict of interest, failure to

comply with a court order, and misappropriation of client funds.

IN RE HENRY D. MCGLADE JR. Bar No. 379954. June 6, 2013. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and indefinitely suspended McGlade, with the right to seek reinstatement after five years or after his reinstatement to the bar in Maryland, whichever is first. The Maryland court found that McGlade violated rules relating to incompetence, negligence, communication, candor toward the tribunal, dishonesty, and conduct prejudicial to the administration of justice.

IN RE GREGORY MILTON. Bar No. 978857. June 6, 2013. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and indefinitely suspended Milton, with the right to seek reinstatement after 90 days, *nunc pro tunc* to May 17, 2013. Milton's reinstatement is contingent upon a showing of fitness. In Maryland, Milton stipulated that his conduct violated rules involving neglect of a client's matter, failure to communicate with a client, dishonesty, and candor to the tribunal.

IN RE ALFRED A. PAGE JR. Bar No. 480892. June 13, 2013. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Page. Page consented to disbarment in Maryland for misconduct, including abandonment of a client, dishonesty to a client, dishonesty to a court, and failure to safeguard an advanced fee until earned.

IN RE JAMES C. UNDERHILL JR. Bar No. 297762. June 13, 2013. In a reciprocal matter from Colorado, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Underhill for one year and one day, stayed in favor of a nine-month suspension and a two-year probationary period subject to the conditions imposed by the state of Colorado, *nunc pro tunc* to March 12, 2013. Underhill consented to discipline in Colorado for misconduct, including failure to deposit unearned fees in trust, failure to return unearned fees, failure to supervise nonlawyer assistants, neglect of client matters, and dishonesty.

IN RE JINHEE KIM WILDE. Bar No. 436659. June 20, 2013. In a matter involving a criminal conviction entered in a foreign country, the D.C. Court of Appeals dismissed the matter without prejudice to Bar Counsel's initiating proceedings regarding Wilde pursuant to D.C. Bar R. XI, § 8.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE EDWARD C. BOU. Bar No. 37713. June 18, 2013. Bou was indefinitely suspended from the practice of law in the District of Columbia based on his claim of disability pursuant to D.C. Bar R. XI, § 13 (e).

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted on the D.C. Bar Web site at www.dcbar.org/discipline. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter *and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dccourts.gov/internet/opinionlocator.jsf.*